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DICTA

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RECRUITING THE PROFESSION

By Roger H. Wolcott of the Denver Bar

(Dean of the Law School of the University of Denver)

A LEGAL directory lists 1625 attorneys in Colorado, 1050 of them in Denver, and 575 elsewhere in the state. The list includes judges, and includes some persons who are giving their main attention to enterprises other than practice, but even after such deductions, the showing is impressive. The length of the roll is due to past rules of admission and not to present rules. After allowing for deaths and withdrawals annually, the list is probably increasing each year by thirty or forty names, as sixty-three new attorneys were enrolled after the two 1928 bar examinations, for instance, the majority of whom will remain in the state, and there are also several attorneys each year who move to Colorado from other states and are admitted without examination.

These figures are for our own state only, where the number of law students and candidates for the bar now remains fairly constant, the number in local law schools being no greater today than it was five years ago. In the nation at large also, the profession is growing, but judging by the increase in law students, the growth in the nation is at an accelerating rate and has not kept down the way it has begun to in Colorado. Mr. Alfred Z. Reed, of the Carnegie Foundation for the Advancement of Teaching, states that there were 24,503 students in American Law Schools in 1919-1920 and 44,340 in 1925-1926, an increase of over 80 per centum in six years. His estimate for the fall of 1927 is 46,786. In New York City, Dean Young B. Smith of Columbia Law School points out that the half dozen larger law schools there had a combined enrollment of 2,705 in 1916, which increased to 6,225 in 1923, and to more than 10,000 in 1928.

If no new attorneys had been admitted to practice in the United States during the past year or two, it is probable that the attorneys already in practice could have met the public's legal needs, which means that the profession is in a position to experiment, if it wishes, with the raising of standards for admission to its ranks, and the experimenting is taking place.

This is something which the lawyers have been slow to do. The profession has been on a high plane, and in spite of occasional accusations of exclusion, no profession has been less mercenary or less inclined to raise requirements for admission from monopolistic motives. In North Carolina, for instance, the Committee on Legal Education, under the direction of Mr. Alexander B. Andrews, made a study and tabulation last year, and found incidentally that in that state a person who had finished grammar school could become a lawyer with one-third the further period of study which he would have to have if he should aspire to become a chiropodist, optometrist, or elementary school teacher. To become a dentist he would need four and a half times the course required of candidates for the bar, and the future doctors must take a course nearly six times as lengthy as the future lawyers. Trained nurses in North Carolina are rather low in the scale, and are required to have only twice the amount of higher education demanded of lawyers but the committee states that most of the hospitals there refuse to accept nurses who have had no more than such minimum education. There are nine states which require less from law candidates than North Carolina requires, and six states besides which require less from their lawyers than the one-year of high school and three years of professional study required of North Carolina trained nurses.

Suggestions for limiting bar admissions, or of raising standards of education, have begun to come from the outside. President Robert Appleton, of the Association of Grand Jurors of New York County, speaks favorably of the suggestion for conditional admission to the bar, withholding life-time admission until after a period of probation and observation. Mr. Alfred Z. Reed, who, although a leading authority on legal education, is not a lawyer, points out that the law is a public profession, requiring a high standard of

character and ability, and that the public is directly interested in the profession's personnel and training. His own special interest is in legal education, which he has greatly furthered by his writings and reports.

This article is not intended to urge restriction of numbers, nor increase of numbers in the profession, but merely to report on what is going on. Within the legal profession there has been great breadth and tolerance on the subject of bar admissions and preparation, aside from the desire of members to avoid accusations of selfishness. Those within the profession who have given thought to the matter have been inclined to assume that some other organization than their own was considering the problem. The American Bar Association has realized that admission to practice is a matter for each state to settle for itself. Many of the state bar associations are only moderately active and they do not universally have Committees on Legal Education with a bent for research. Some of the most active and well organized bar associations have been those of counties and cities, whose primary attention has been given to questions of less than statewide import. The lawyers have perhaps taken it for granted that the law schools are organized on this subject and are working to secure higher requirements for admission to practice in the several states, both of which the law schools generally are not. In Massachusetts, for instance, a candidate for the bar need have only two years of night high school, or its equivalent, by way of pre-legal education, while the commonwealth's oldest law school, Harvard, has for thirty years been requiring college graduation as the pre-legal minimum for entrance. The state and the school have gone their respective ways and there is no indication that either of these two institutions has any inclination to try to convert the other, or that it would be desirable. The question of enlarging or contracting the list of lawyers is for the lawyers.

The American Bar Association manifested an interest as early as 1890 when its membership was 1000 as compared with the present 26,595. Its Section on Legal Education was created in 1893, and in 1897 the Association endorsed high school graduation and a three year course of law study as requirements for admission to the bar. This position was

again affirmed in 1908 and 1918. In 1921 the Association recommended two years of study in college, followed by a three year period of law study, as a requisite for admission to practice, and has for several years given wide publicity to the recommendation. It has met generally with approval or indifference rather than with any active opposition. This 1921 requirement is now effective in 12½ per cent. of the states, and the same requirement, or something beyond, is in force in 42 per cent. of the law schools as the requirement for graduation. The law schools have been more responsive than the states. For the law schools observing these standards and certain further standards, there is the Association of American Law Schools, which by the reward of membership has furnished a further incentive to law schools for self-improvement, and has caused them to be less inclined to stand still than the states have been.

The American Bar Association's Council on Legal Education now has regulations which make its standards the same as those of the Association of American Law Schools, and the Council publishes from time to time the names of law schools which comply with its standards. The Council is directed by the American Bar Association "to make such publications available so far as possible to intending law students". Sixty-five of the country's 175 law schools are on the Council's approved list and of these same 65 law schools, 62 are members of the Association of American Law Schools.

The Council's persuasion and the influence of the Association of American Law Schools is upon the schools rather than upon the states, and it has been here shown that in percentage of compliance with recommended standards the schools have risen above the level of the states. In the direction of supplying the bar of the future with fewer and better lawyers, about all has been accomplished for the present that can be accomplished by working on the schools. Of the 110 schools which are not yet approved by the Council on Legal Education, two or three a year in the next few years may succeed in meeting the standards, but many of them cannot do it until the states in which they are located raise the standards for admission to practice. Harvard and Columbia, with their high standards, have been able to flourish in states

which have in the past had low bar admission requirements, because Harvard and Columbia are financially independent, and a majority of the law schools of state universities have been able to also, for a like reason. It is to be noted, however, that only one-eleventh of New York City's law students are at Columbia, Columbia being the city's sixth school in size, and that Harvard Law School has two neighbors that are both larger in enrollment than she is, so that the bar's benefit from receiving Harvard and Columbia trained members is diluted by the influx from other sources.

The principle may be elaborated upon by an illustration from a neutral point like Arizona. In Arizona the state's only law school requires two years of college for admission, while for admission to the bar of Arizona, one need apparently have no more than a grade school education, or perhaps even less. If the state had a large population and several metropolitan centers with law schools in them requiring only grade school education for admission, there would be a six-year differential against the state's standard law school and in favor of the schools founded on the strength of lenient bar admission requirements. The heavier enrollment would be in the short-cut schools and the additions to the bar of the state would be more from that type of school than from the school requiring the six years of pre-legal training. This is what has happened in some of the more thickly populated states, and is why many of the 110 unapproved law schools cannot raise entrance requirements and other standards until their states raise bar admission requirements. New York, by the way, has now raised its requirements for the bar to two years of college plus three years of law school, effective October 15, 1929.

At present therefore, the situation is that over one-third of the country's law schools are observing American Bar Association standards, some of them being influenced and aided to do so by the rules of the Council and the Schools Association. The number of approved schools is slowly increasing and the proportion may reach one-half of the total number of American schools within the next few years, but meanwhile, from two-thirds to one-half of the admissions to the bar will be from the schools not so approved, and some of the schools

not approved are not susceptible to the influence of either the Council or the Association, and will remain unapproved. The situation will stay fairly stationary until the states whose requirements for admission to practice are below those recommended by the American Bar Association raise the standards gradually to those of the American Bar Association, thereby gradually decreasing the present differential in favor of schools designed for the passing of bar examinations rather than for preparation for the after years of practice.

Some states are increasing the severity of their bar examinations. It is almost impossible, however, to devise a bar examination which will perfectly separate the sheep from the goats, and instead of trying by the examination to check the invasion of applicants at the state's last line of defense, it is fairer both to the state and the candidate to do some of the checking by a process of selection at an earlier period in the candidate's career. In Massachusetts in December, 1927, there were 498 candidates who took the bar examinations and 66% failed. In examinations of November, 1927, in Maryland, and March, 1928, in Rhode Island, the failures respectively were 69% and 79%, percentages which are materially higher than in the states requiring a larger amount of educational preparation of candidates. Would it not have been a better method of choosing future lawyers to have required a year or two more of study preceding the bar examinations, rather than to induce a period of cramming following a failure? The cramming will be with examinations in view, rather than preparation for practice.

There was little criticism a generation ago of requiring high school graduation of our future lawyers. Today there is nearly as high a proportion of the population who have completed two years of college, or who have had the opportunity to, as there used to be who had completed high school. Not only have colleges increased in number and doubled and trebled in enrollment, but summer schools, extension courses and the like have become far more common than formerly. The junior college movement, covering the first two years of the college course, is so recent that many of us have not awakened to it. The 1928 "Blue Book" lists some 374 junior colleges in our 48 states, in addition to our older colleges and

universities. It is possible that a present day requirement of two years of college does not represent a real increase over the apparently lower requirements of thirty years ago.

What has been accomplished to date, in planning the make-up of the next generation in the profession, is that Colorado and five other states require two years of college plus three years of law school, of future attorneys, these requirements for the most part being put into force very gradually, to give ample notice. Colorado extended every consideration to those whose preparation had begun under earlier rules, and hardships were avoided when possible. Several additional states seem likely to join these six in the near future. Delicacy interferes with suggesting to a sister state that she raise her bar admission requirements, but example is very effective. In Colorado the number of new attorneys per annum is not growing larger. Law schools, under the regulations of Colorado and many other states, have largely superseded law offices as a place of preparation for the bar. Colorado's law schools all require their graduates to have two years of college work, followed by three years of law school study, and the same is true of over a third of the country's law schools.

The American Bar Association's Council and the Association of American Law Schools have gotten into close touch and co-operation, with increased effectiveness, and have created a standard by which law schools can be measured and compared. The Carnegie Foundation for the Advancement of Teaching is making elaborate and impartial studies of the work of these two organizations, and of legal education, and is giving them publicity. The Colorado authorities have made full use of the material in recent revisions of rules, as have the authorities of Illinois, Kansas, New York, Ohio and West Virginia. Montana and Wisconsin are close behind. When the bench and bar of other sections come to consider the data now so complete and accessible, it seems likely that other states, whose bar admission requirements were fixed before there were ready reference works on the subject, will act in the mattter, and revise their bar admission requirements upward or downward, consistently with the policies upon which they determine.

REAL ESTATE TITLE EXAMINATIONS

By Arnold Weinberger of the Denver Bar

THIS paper is intended for lawyer and layman alike, as a plea for adequate compensation for the members of the legal profession who must (unfortunately) devote their time to the examination of titles to real estate—among the most important, yet least remunerative, of all services they are called upon to render.

The work of examining real estate titles has grown to enormous proportions during the past few years. As long as thirty-six years ago, our Court of Appeals in *Taylor v. Williams, 2 Colo. App. 561,* had occasion to observe that:

> "Few persons purchase real estate at the present time without obtaining from the vendor an abstract of the vendor's title and with the view of having such title passed upon by some one learned in the law."

There has been an unprecedented increase in real estate loans, transfers, financing programs and transactions of every kind and character, due to the general commercial and industrial expansion, the great influx of population, the rapid growth of cities, towns and rural districts, and the extraordinary building activity that has been prevalent everywhere in the United States. This has not been without its effect on the legal profession. The business of title examinations, which, prior to this era of expansion constituted only a very small part of a lawyer's practice, has increased in proportion to the general prosperity of the land, so that today it is a very important part of his work.

It has been said that no question of law more constantly presents itself in the average law practice than that of the title to real estate. And this, notwithstanding the inroads made by title guaranty companies on this type of work, which formerly was an exclusive function of the legal profession, for it still seems that the average careful investor desires the independent old fashioned examination by his attorney, although often in conjunction with a title guaranty policy.

A brief reference to the history and development of abstracts of title and title examinations will suggest why title examination work has become so important.

Warvell, Thompson, Martindale and other writers on the subject agree that there is little definite information concerning the origin of the practice of furnishing abstracts of title. Yet they are used generally throughout the civilized world, although the systems employed are vastly different.

In England there is evidence of the use of abstracts for some considerable length of time. References to their use are found in English writings during the early part of the Nineteenth Century as an established custom and practice. In England abstracts are made from the original instruments comprising the chain of title and title examinations are made from such abstracts or the original instruments themselves. In this way, the use of the abstract of title probably originated. There was great danger of the loss of the various muniments of title. Hence the owners were loath to part with them and furnished the abstract instead. Notwithstanding the adoption of the Torrens Registration System in 1875, the custom of making abstracts from the original unrecorded documents in England has never been abandoned and still prevails. It is the practice for the vendor's attorney to prepare the abstract and submit it, together with the original documents of title, to the attorney for the vendee, who compares them and determines whether the abstract correctly and fairly shows the condition of the title. If there are any objections, the attorney for the vendee makes so-called "requisitions" for corrections. These objections must be made and certified within a specified time or they are deemed waived and the title is considered accepted.

In this country, the English system was adopted in the colonial states and to a great extent still prevails in the eastern part of the United States. It has been departed from in the middle and western states, where abstracts are prepared from the public records instead of the original instruments; a procedure which is so familiar to all lawyers that it requires no further explanation. However, in this country during the earlier years, abstracts were practically not used at all. There was little necessity for their use for title passed by inspecting the original deeds and instruments of title and by the vendor's "warrantee" deed. With this and the covenants contained therein, the purchaser was satisfied. Conveyances and changes

in title were infrequent. The average purchaser relied to a great extent on the possession of the seller as conclusive evidence of his ownership, and on his deed of transfer. But with the passing of the years and the ever increasing commercial activity and development, property began to change hands more frequently and the old method was no longer convenient or practicable. Laws were passed everywhere which facilitated the transfer of titles; property disqualifications were gradually removed; titles soon became encumbered and involved with numerous ownerships; legal questions began to arise concerning the sufficiency of conveyances; real estate became more valuable and purchasers more careful. They no longer relied on the past or the present. Possession under the new order was only an incident of ownership, and the "warrantee" deed merely evidence thereof. The owner must look forward to the future and be careful to see that his title will be accepted by a subsequent purchaser. All of these and many other considerations gave rise to the development of the modern abstract of title and, as an indispensable incident thereto, the trained and qualified title examiner.

In the course of a pending real estate transaction, there are often great delays because of title defects, due to many causes, some of which will now be considered.

In the first place, seldom, if ever, does the vendor of property have his title examined before entering into a contract of sale. It is rather the custom to do it afterwards. There are often party-wall agreements, restrictions, reservations, rights of way, easements and many other similar encumbrances involved in a title which should be excepted or provided for in the contract and which, obviously, will be overlooked unless there is an examination of the abstract prior to drawing the contract. The dangers involved and the difficulties to be avoided are well stated by Martindale in his work on Abstracts of Title, in which the author says:

"Title Should be Investigated Before Sale is Contracted. It often happens that a defect in the title, disclosed to a purchaser, leads to a claim by a person who may assert a title founded on this defect; it is, therefore, a very prudent caution on the part of sellers to have their title thoroughly investigated by their own counsel before they offer their lands for sale, so that they may be satisfied that there is no reasonable chance of exposing their

title to a successful claim, or even to a troublesome and expensive litigation. Nor is this the only advantage to be derived from such a previous investigation, under the advice of those who are conversant with the subject. The formal difficulties with which the title may be attended may be pointed out; the necessary steps may be taken to remove the cloud; or, if the defect be found insurmountable, provision may be made in the conditions of sale against the production of proof of any deed or other fact, so far as to compel a purchaser to accept a conveyance without the same. As a consequence of the want of such precaution in having the title examined, and all matters of dispute growing out of it settled, before entering into a contract, delay is often occasioned, interest on purchase money lost, and expensive litigation incurred in seeking to enforce or resist specific performance of the agreement.

It would be a wise precaution on the part of real estate agents and brokers to adopt a rule requiring sellers to furnish an abstract of their titles before placing the property upon the market, in order that they might be enabled to protect the interests of their clients in contracting for its sale, and that buyers might know what title they were negotiating for; besides this, a sale is often defeated in the time it takes to prepare an abstract, where one has not been prepared in advance. Moreover, an abstractor should not be compelled to make a hurried search."

Secondly, an unusually large number of persons deal in real estate without any title examination at all. They are satisfied to accept the title because the seller said he had had it examined or so and so passed it for a loan. Much to their discomfort, they may soon ascertain that the title is being held up on account of defects. This often results in losing a profitable deal.

There is more truth than fiction in the story that is told of the person who became involved in title litigation and thought he had a good title when he bought the property because the seller furnished an abstract of title in a handsome blue cover, with a beautiful gold seal and red ribbon on it.

Frequently, an investor prefers to act as his own lawyer or permit others outside the legal profession to meddle with titles, not appreciating the importance of referring this work to those specially trained for it, until some difficulty arises. Often it is then too late and irreparable loss may follow. Said Judge Cooley many years ago, in the introduction to his excellent edition of Blackstone:

"Real estate has been cheap; we have been near the sources of title; conveyances of any particular parcel have not generally been numerous, nor the title complicated; the modes of transfer have been tolerably uniform and well understood; we have a general system of registry designed to give purchasers

information concerning the conveyances which have been made; and as every man of plain common sense is able to understand all these, one naturally comes to think that the nearest justice of the peace is competent to transact the business connected with his purchases and sales, and that his own good sense is sufficient to protect him against flaws in titles, or against being entrapped through the means of inadequate conveyances of the land he buys. Unfortunately he sometimes discovers, when too late, that unaided good sense is not always an infallible guide in matters of law, and that one who relies on it, implicitly, is in the proper condition of mind to be made the victim of misplaced confidence. Many a man has lost his all by assuming the sufficiency of his own knowledge and judgment in real estate matters, and by resting satisfied with his own examination or that of his county register of deeds, where he ought to have called in the best legal advice that was attainable."

The foregoing is unquestionably sound advice today.

In the third place, many investors do not select a title examiner with the same degree of care that they would choose a medical adviser or specialist. The work of title examinations is indeed a specialty. It requires painstaking care and caution in every detail of the work and a thorough knowledge of the numerous legal and practical problems which arise in connection therewith and, among other things, a comprehensive understanding of the significance and meaning of every word and term in contracts concerning real estate. As one example—witness the subject of marketable titles. What is a marketable title? The decisions on the subject are innumerable. Titles are indiscriminately referred to as good, marketable, perfect, satisfactory, etc., yet each one carries its own distinctive meaning and upon that interpretation a contract may stand or fall, a law suit be invited or forestalled. The latter fact appears by reference to a recent 300 page annotation in 57 A. L. R., pages 1253-1554, in which, on the subject of marketable titles and various defects in titles, there are 957 point citations to New York cases alone, 286 to New Jersey cases, 194 to Massachusetts, 165 to Illinois, and 167 to English cases. Many Colorado citations are included.

In England, title examination has become "a highly artificial system of rules and practice which maintains its own separate body of practitioners," while "in this country the tendency has been to loose and incoherent practice in the examination of titles and the drawing of conveyances, and few practitioners take the trouble to inform themselves in the nice distinctions and technical discriminations with which the

law of conveyancing abounds". (Martindale—*"Abstracts of Title"*, page 2).

The last-mentioned criticism of the profession by Martindale leads one to search for possible causes of this tendency to a "loose and incoherent practice in the examination of titles." If this be true, may it not be principally attributed to the insignificant fees paid to the profession for this important service? Hasty title examinations are frequent. Why? Because the average client, not appreciating the great volume of work involved in, and the responsibility of the attorney attached to title work, will not adequately compensate him for the same. The experience of the average lawyer is about as follows: A client comes to his office and states that he contemplates purchasing a parcel of real estate or making a loan. The deal usually involves a considerable sum of money. He places the abstract on his attorney's table and with it the entire responsibility. He expects to receive an assurance that his money will be invested or loaned safely. He immediately dismisses all worry regarding the matter from his mind and relies entirely on the advice of counsel. He expects the usual opinion of title under the signature of his attorney. Several hours, sometimes days of time must be spent in examining the title, and among other numerous things, inquiring into the condition of taxes, attending to a survey of the property, ascertaining the rights of those in possession, closing the deal, etc. Counsel may be obliged to resort to the law books to determine whether certain irregularities he may have found should be objected to or passed. If the title is complicated by foreclosures, court proceedings or estates, still more time is consumed in examining the original records and documents on file and weighing their legal effect. Upon completion of the title work, the attorney proceeds to draw the deeds, mortgages, releases or other necessary documents. He makes the required adjustments, closes the transaction and attends to the recording of the papers. Nor does the work cease after the opinion has been rendered and the deal closed. The next title examiner, at some future time, may discover something in the title about which he is doubtful or which he deems defective and which the previous examiner considered immaterial or inconsequential. The first examiner is then called upon to make correc-

tions. Perhaps he relied entirely upon the abstract and did not carefully examine the original records. Something may have appeared therein which was not disclosed in the abstract, or his opinion may have failed to except doubtful matters in the title, or a real defect may have been overlooked altogether. In the conference which follows between attorneys, a discussion ensues in which much speculation is indulged in as to what the law is or might be with reference to the objections raised. Sometimes they are frivolous and in fact do not affect the marketability of the title; other times they are questionable, and in still other instances, beyond any doubt, they are real. In the last-mentioned case, of course, there is nothing to do but correct or quiet the title at the attorney's own expense. In the former, the objector must be convinced that his objections are without merit, often an impossible task. And for all the foregoing the examining attorney receives the munificent fee of $15, with a possible additional $5 or $10 for closing the deal, sometimes more and often less; hardly an ash hauler's wage for the time consumed and the responsibility assumed.

The road which the title examiner must travel is rough indeed, beset with pitfalls at every turn. For the sake of the security of titles and property, the public sooner or later must be educated to the necessity of adequately compensating the profession for this highly technical work. This will insure better title examinations and fewer title complications.

WHAT OF BAR ADMISSIONS?

By Stanley T. Wallbank of the Denver Bar

The Court: Who was the first Chief Justice of the United States Supreme Court?

Applicant: (Hesitatingly) John Marshall, I think.

The Court: What is the fundamental law of the land?

Applicant: The laws made by the Legislature.

The Court: Why do you wish to practice law?

Applicant: Because it looks like the easiest way to make money and get ahead.

Startling as the above dialogue may seem, it nevertheless is not uncommon for applicants on examination for admission to the Bar to make similar, or even more astounding, answers, all of which suggests a few considerations of the present method of admission to practice law in Colorado.

In striking contrast to the time when no written or formal examinations were held,—the applicant then merely submitting to a brief oral questioning by one member of the Court which sometimes was, although quite a delight to the Court and the applicant, very little of a test of the aspirant's qualifications—is the present day system of examination by the Committee of Law Examiners and the Bar Committee. The latter is appointed by the Court to pass upon the moral and ethical qualifications of the applicants. The Committee consists of five members, three of whom examine each applicant personally. Theirs is a most important duty although herein the work of the Law Examiners alone is considered.

The Committee of Law Examiners, known as the Law Committee, consists of nine members appointed, pursuant to rule, by the Supreme Court of Colorado, the members being largely distributed as to geographical location and being selected wholly apart from political, religious, social and similar considerations. The members serve for five years. They receive no compensation. Their responsibility obviously is to pass upon, subject to the rules, direction and supervision of the Court, the educational qualifications, general

and legal, of all persons who apply to practice law in Colorado.

As to admissions upon motion, the present Supreme Court rule is, in substance, that those applicants who are not then citizens of Colorado, but have been admitted to practice in another State, and have practiced there ten of the eleven years immediately preceding application here, comprise Class "A", and may be admitted upon motion, unless their general educational qualifications are contested, in which case proof may be required by the Law Committee, which is subject to the approval of the Court. Those who are not then citizens of Colorado, but have been admitted to practice in another State, and have practiced there five of the six years immediately preceding application here, or taught for such period in an approved law school, comprise Class "B", and may be admitted upon motion, provided the requirements for admission to practice in the State where the license was granted are equal to the requirements in Colorado; subject, of course, to the same right of contesting general educational qualifications.

The rule has its foundation very largely in comity. Under it 119 lawyers have been admitted to practice in Colorado since 1920. As a rule, it is believed that attorneys so admitted upon motion meet well the educational requirements, both general and legal, formulated by the Court.

Respecting the applicants who submit to examination, no such general satisfaction of the educational requirements is found. In fact, there appears to be a growing tendency on the part of this class of applicants to exhibit a lack of grasp of the fundamentals of legal education and of that background of history, philosophy, political science, economics and general education, all so requisite in anyone who would improve or even uphold the high standing of the profession as it has prevailed through the centuries. It is quite common for applicants to show no fundamental grasp of the English language, not to mention that a regrettable number seem quite unable to write their answers to questions in any way except to make the untangling of their undecipherable hieroglyphics a guessing contest on the part of the examiners.

A refreshing minority of the applicants, however, bring delight to both the examiners and the Court in their formulation and presentation of answers from substantive, rhetorical, grammatical, general educational and cultural aspects.

The work of the Committee is so divided that each of the nine examiners is assigned a given subject which is one of those covered from time to time in the examinations. The subjects cover the important fields in law and equity and vary from year to year. The examinations are held in July and December of each year. The assignment of a subject is made several months before the time of examination. Each examiner is required to prepare written questions upon the subject assigned.

A meeting of the Committee is then called, considerably in advance of the examination, at which time all of the written questions prepared by the examiners are carefully considered by the examiners as a committee of the whole, which results in many substitutions and amendments to questions, and removing possible ambiguities and duplications. At least a half day is required by the Committee for this consideration of the questions. The revised questions are then ready for the printer.

The present written examinations consume two full days, four subjects usually being assigned for each day. The examiner who has prepared the questions on a given subject is present when the written examination on his subject is held, to be in readiness for applicants who may make *bona fide* inquiry concerning the form or purpose of a question and generally to supervise the examination on that subject. The Secretary of the Committee presides over all written examinations and requires the printed questions to be handed in at the close of the session and prohibits the copying of these questions.

Upon commencing the examination each applicant is given a number by the Secretary of the Committee, under which number he submits his entire examination. The name or identity of an applicant never appears upon any of his papers, and the number assigned is known to no member of the Committee or Court, and only to the Secretary of the Committee who does not participate in the examination. In

this way, no member of the examining committee knows the identity or authorship of any answer until all grades are submitted and made final.

The third day of the examination is given over to oral questioning, the forenoon being devoted to oral examination by the Supreme Court sitting en banc, and the afternoon to individual oral examination of the applicants by the members of the Committee separately. Much insight is gained into the qualifications of the applicants in these oral examinations, although unfortunately they are so limited in time as to fail of their highest objectives.

After the entire examinations are completed, each examiner is given the papers in his subject, for grading. This task is proving to be somewhat extensive. An average July class of applicants may number 80 or more. It is not uncommon for a paper to require more than an hour for a careful reading and review, and in many instances a re-review. Thus many of the examiners report that ofttimes a week to two weeks of their working hours are required before they feel willing to complete their grades of one examination. In this connection, as in many others, the members of the Committee have exhibited a tireless and genuine interest in this all important task assigned to them.

The grades and papers are forwarded by each examiner to the Secretary of the Committee, who then compiles the grades and averages. Thereupon, a meeting of the entire Committee is called to authorize the return to the Court of the individual and average grades of each applicant. Only after the Committee's recommendations are completed and ordered certified to the Court does the examiner know for the first time the authorship of the papers he has graded. Approximately 45% of the applicants in the most recent bar examination in Colorado failed of admission. Since 1920 there have been 632 applicants recommended by the Committee for admission to practice law in Colorado upon examination.

The Committee in these meetings also gives serious consideration to the entire field of the examinations, to recommended improvements and to bar examination matters in general. In devising the form and character of examination the

Committee is constantly giving serious thought to the changing educational conditions and to the type of examination that most fairly tests the ability of the applicant.

It is conceded that if the old type of bar examinations were strictly adhered to, many unqualified applicants, who may have mastered printed quiz books in the various subjects, might with facility pass the examination, so thorough and comprehensive are such quiz books now prepared with full answers to the questions propounded. The practice of coaching students primarily for the purpose of enabling them to pass the examination has, of course, been rightly condemned by all authorities and law schools of high standing. The Advisor to the Council of Legal Education of the American Bar Association says, "Very few bar examinations have ever been devised that a bright young man who crams intensely for three months cannot pass." The Association thus refuses to approve any school that "as a part of its regular course conducts instruction in law designed to coach students for bar examinations." The problem is thus one of concentrated cramming against proper and adequate training.

In this connection, much attention is being directed to some of the newer tests which seek *inter alia* a knowledge of the salient principles, the ability to apply a definite principle of law to a given state of facts, the knowledge of technical words and phrases, facility of proper expression, orally and in writing, and a knowledge that is not born of memorizing words which have little meaning to the memorizer. Many of the leading law educators of the country, in order to meet the above requirements, are recommending the long question and short answer type of examination, also called the true-false and new type system, whereunder the applicant must answer a greater number of questions, his answers consisting of "yes", "no", or the insertion of a few words, or the naming of a legal principle. The questions are so designed as to search fundamentally his grasp and knowledge, and cover a larger field. Under this system the applicant is warned not to guess, that each mistake counts as a penalty, that omitted answers count less than penalties, and that each statement must be taken in disregard of every other statement.

Another most promising investigation concerns the new and elaborate Pennsylvania system of admission to practice,

which has been eagerly analyzed and will be as eagerly watched to determine its practicability and efficiency.

The Committee is conscious of the two schools of thought, the liberal and the conservative, on the subject of admissions but, of course, is guided at all times by the direction and supervision of the Court. It is no pleasant contemplation to picture an applicant who has completed a high school course, two years of general college studies, and three years of approved law school courses, who fails two or three times in his attempts at bar examinations. But the Court in fixing standards from time to time is not oblivious of the fact that its solemn responsibility in regulating admissions cannot be lightly regarded. It recognizes that responsibility both toward the profession and the public. In this connection, it may be recalled that the number of law school students in the United States in 1926 had increased more than 80% over those in 1920, whereas the corresponding increase in population was approximately 10%. During this same six-year period, the number of lawyers increased over 30%.

The above fragmentary and uncorrelated data is offered in the hope that there may be inspired on the part of the Bar generally a greater interest in the matter of admissions to practice, and the forwarding to the Court by individuals, committees and Bar Associations of recommendations, constructive criticisms and suggestions for improvements. For do we not as lawyers have a grave responsibility to those invited and permitted to enter the portals of our loved profession which for so many centuries has signified to the world leadership, integrity and a sound administration of justice?

CAVEAT APPELLANT

A CASE of particular interest to members of the Denver Bar is the recent case of *Halter vs. Wade, 273 Pacific 1042,* because a failure to observe the rule therein set forth may not only prevent you from getting the review of your case in the Supreme Court, but from even being able to get it started on its way out of the District Court.

Rule Twenty-one of the Denver District Court relates to the Bill of Exceptions and requires that immediately after tendering to the Judge, it shall be lodged with the Clerk, and the party tendering same shall forthwith notify the opposite party thereof. The rule further requires that unless the opposite party shall, within fourteen days after date of service of notice of lodgment, file objections, that the Judge shall upon request sign, allow and seal said Bill of Exceptions.

In the above case, the Supreme Court has interpreted this rule and said:

"Plaintiffs in Error fail to comply with Rule Twenty-one. It was made by the Court, consisting of seven Judges sitting enbanc. No single Judge has the power to ignore it or waive its enforcement. It was made to be enforced just as much so as if the Legislature by Statute enacted it, and, in that case, no Court or Judge could properly disobey it."

The words "immediately" and "forthwith" mean exactly what they say according to the Supreme Court. It has been the practice among a good many attorneys here in times past to take the Bill of Exceptions and work out their Abstract of Record, and then when they got around to it, tender it to the Judge and pay little attention to lodging it with the Clerk of the Court until they are ready to get their case into the Supreme Court.

Judge Frank McDonough of the District Court has called our attention to this matter, the importance of it and the fact that the Bar is apparently not familiar with this recent decision, since already some of the Judges of the District Court in obedience to this decision have been compelled to decline to sign a Bill of Exceptions where Rule Twenty-one was violated.

THE ANCESTRY OF MARBURY v. MADISON

By John H. Denison of the Denver Bar

(Former Chief Justice, Colorado Supreme Court)

MARSHALL was not the first judge to hold that the supreme court had power to declare an act of congress unconstitutional. The act of March 23, 1792, 1 Stat. at Large, p. 223, relating to invalid pensions, provided "that any officer, soldier or seaman * * * shall also be allowed such farther sum for the arrears of pension * * * as the circuit court of the district * * * may think just;" and made it the duty of the judges of the circuit courts to remain five days at least, from the opening of the session thereof to give full opportunity for the relief proposed by the act, and further "That in any case where the Secretary (of War) should suspect imposition or mistake, he should have power to withhold the name of the applicant from the pension list and make report of the same to congress at their next session.

The Circuit Court for the District of New York, consisting of Jay, Cushing and Duane, took up this act. Jay was then chief justice of the Supreme Court, Cushing was on that bench and Duane was judge of the district court of New York. They declined to act as a court under the above mentioned statute on the ground that "neither the legislative nor the executive branches [of the federal government] can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in the judicial manner;" that the duties assigned were not judicial because they subjected the decisions of the court to consideration and suspension by the secretary of war and to the legislature; that no executive officer or even the legislature was authorized "to sit as a court of errors on the acts and opinions of this court." The judges then construed the act as appointing them personally as commissioners and thus took it upon themselves to carry out its provisions.

In Pennsylvania the circuit court, consisting of Wilson and Blair, Justices of the Supreme Court, and Peters, District Judge, addressed a letter to the President to the same effect, except that they declined to act at all. The Circuit Court for the District of North Carolina, consisting of Iredell, Asso-

ciate Justice of the Supreme Court, and Sitgreaves, District Judge, addressed a letter to the President, in which they set forth the same matters, construing, obviously correctly, though contrary to New York, the statute as referring to the court and not to the judges of it. They nevertheless resolved to act as commissioners on account of the serious consequences to "unfortunate and meritorious individuals" if they refused their cause. Thereupon Attorney General Randolph moved for mandamus in the supreme court of the United States against the circuit court for the district of Pennsylvania, to compel that court to obey the act. The supreme court took the matter under advisement but before decision congress repealed the act by the Act of Feb. 28th, 1793, 1 St. at Large, p. 374, *Hayburn's Case and Notes, 2 Dallas, 409.*

The great constitutional question decided in *Marbury v. Madison,* is said by Senator Beveredge not to have been essential to the decision of that case. Whatever may be true as to that, it is certain that the circuit courts of New York and Pennsylvania, with four of the five* supreme justices sitting thereon, in refusing to perform the duties placed upon them by an act of congress on the ground that that act was unconstitutional, did not merely declare but held it to be so; that their colleague, Iredell, agreed with them we know and we know, therefore, that the supreme court of the United States at that time was unanimous upon the point decided by Marshall and his colleagues twenty years later. The importance of this lies not in the fact that it adds the mere authority of these judges to that of Marshall and his colleagues in support of the principle stated in *Marbury v. Madison,* but that it shows that the maintenance of that principle was inevitable, and that it was recognized in what Mr. Dallas, the reporter, says was the first case in which the constitutional question was presented, and was agreed to by all the judges upon exactly the grounds which governed the opinion of the great Chief Justice.

It is interesting also to note that in the Federalist the proposition later declared by the courts is asserted and taken for granted and made the basis of further deductions (Fedst. Nos. 53 and 78).

*Johnson had then been appointed but had not qualified.

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

BOARD OF DENTAL EXAMINERS—JURISDICTION—PROHIBITION —No. 12108—*People vs. State Board of Dental Examiners, et al—Decided March 4, 1929.*

Facts.—Mahurin, a dentist employed by Painless Parker Dentist, a California corporation, filed a petition in the Denver District Court for a writ of prohibition against the Board to restrain it from determining his right to practice dentistry. Mahurin conceded that the decision in this case depended upon the right of the employer corporation to operate dental offices in Colorado.

Held.—In the companion case, No. 12050, the Supreme Court held that the corporation could not practice dentistry in Colorado. The writ of prohibition in this case was, therefore, properly refused.

Judgment Affirmed.

BULK SALES LAW—VARIANCE—No. 11937—*Englewood State Bank vs. Tegtman—Decided March 18, 1929.*

Facts.—Tegtman, the owner of a store, sold the store to Dolton, with an agreement that if Dolton did not pay the entire purchase price within a certain time, Tegtman had the right to take back possession of the store and stock of merchandise. The payment was not made and Tegtman repossessed himself of the store and the stock. The Bank levied an execution on the stock of merchandise upon a judgment against Dolton only, and Tegtman recovered judgment for damages.

Held.—The Bulk Sales Law has no application to the facts in this case. The transaction between Tegtman and Dolton was more nearly like a mortgage than a sale, and as such did not come within the terms of the Bulk Sales Law.

There was no variance between the pleadings and the proof.

Judgment Affirmed.

CONTRACT—MEETING OF THE MINDS—INSTRUCTIONS—No. 12027—*Babcock vs. Bouton, et al.—Decided March 11, 1929.*

Facts.—This action was brought to recover money alleged to be due under a contract whereby Bouton, as buyer, and Babcock, as seller, agreed to the purchase and sale of an oil lease for $1,500.00. Shortly thereafter Babcock telegraphed Bouton a new offer for the lease "as agreed to by us in Denver." In reply Bouton wired his acceptance.

Babcock testified that he understood that the instructions as agreed to referred to the provisions of the first contract. Bouton testified that he had in mind the terms of an oral agreement, and contended that there was no meeting of the minds. He tendered to the trial court an instruction that the minds of all the parties must have met before there could be a valid contract. The Court refused to give this instruction, but did instruct the jury that the parties had made a valid contract and that if Bouton was ready, able and willing to comply with its terms, and that Babcock had failed to perform, the finding should be for Bouton.

Held.—The instruction requested by Babcock should have been given, but the ones above mentioned should not have been given because: (1) The question of the meeting of the minds should have been left to the jury; and (2) Bouton must not only have been ready, able and willing to perform his part of the bargain but must actually have delivered, or offered to deliver the assignments of leases.

Judgment Reversed and Case Remanded.

DAMAGES—MALPRACTICE—MUNICIPAL CORPORATIONS—No. 11958—*Meek vs. City of Loveland—Decided March 18, 1929.*

Facts.—Meek brought action for damages against the City of Loveland, mayor, city physician, chief of police, police officer and county physician, for negligently amputating plaintiff's leg. Plaintiff had been drinking, was accosted by a police officer, started to run and was shot by the officer and without any criminal charges being filed was thereafter forcefully removed from his home and taken into the county poor farm

against his will by the chief of police and city physician, where the amputation was performed by the county physician. Nonsuit was granted in the Court below.

Held.—1. City not liable for damages by reason of county physician's malpractice, if any.

2. City physician and chief of police were liable if acting together they caused plaintiff to be removed forcefully and against his will to the poor farm, as the jury would be warranted in finding that they both knew that an amputation was at least probable and by their actions subjected him to treatment by the county physician.

3. County physician is liable for his own negligence and chief of police and city physician liable on theory that plaintiff's injury was suffered by reason of their act in forcefully sending him to the poor farm, and, knowingly, subjecting him to surgical treatment.

Judgment Reversed.

DENTISTRY—PRACTICE BY CORPORATION—No. 12050—*People vs. Painless Parker Dentist, Decided March 4, 1929.*

Facts.—The people brought this action against defendant, Painless Parker Dentist, a California corporation, for unlawfully usurping the franchise of practicing dentistry in Colorado without a license. The defendant demurred on the grounds that it appeared from the complaint that the defendant was a corporation, therefore could not practice dentistry, and that the complaint did not state a cause of action. In argument defendant counsel suggested that the actual work was done by dentists regularly licensed to practice in Colorado, but this does not appear in the pleadings.

Held.—The demurrer admits that the corporation had been practicing dentistry, which our statutes forbid. It is no defense that it is impossible, in the nature of things, for a corporation to pass an examination as to its character and ability. If the defendant desires to raise the point that the dental work is done by licensed practitioners it should do this by answer and not by demurrer.

Judgment Reversed and Case Remanded.

GASOLINE TAX—INJUNCTION—No. 12,043—*Rio Oil and Supply Company vs. James Duce, et al.—Decided February 27, 1929.*

Facts.—Plaintiff company, as a buyer, seller and user of gasoline, brought suit against the defendant state officials to enjoin them from assessing the gasoline tax, and also to have the act levying the tax declared unconstitutional.

Held.—This case is not equitable in its nature, because the statute provides a speedy and adequate remedy, namely; to pay the tax and then sue to recover it. This action, therefore, cannot be maintained.

Judgment Affirmed.

GASOLINE TAX—METHOD OF IMPOSITION—STATUTORY PENALTY—No. 12185—*People vs. Texas Company—Decided February 27, 1929.*

Facts.—The State brought this action against the Company to recover a balance claimed on gasoline sold by the Company in May, 1927, and for a penalty for an alleged failure to pay such tax according to law. The Company paid the tax on gasoline actually sold during that month, but objects to the payment of a tax on gasoline "offered for sale", claiming that the statute means "sold or used"; that it would otherwise be subject to double taxation; that the statute as attempted to be construed by the State is unconstitutional; that the gasoline should be measured at the time of sale and not beforehand; that the tax interferes with interstate commerce; that it is unfair to assess the tax on gasoline in the Company's tanks because of evaporation; that a tax cannot be levied on gasoline sold to the United States; and that the penalty should not be enforced in this case.

Held.—The statute means "offered for sale," whether actually used or not; there is no danger of double taxation; constitutional questions are not necessarily involved; the gasoline is at least impliedly offered for sale in the Company's tanks, and it is immaterial that most of it is actually sold at filling stations; the act specifically avoids interfering with interstate commerce; the State is entitled to a tax on all gasoline offered for sale and it is immaterial that part of this may dis-

appear through evaporation or otherwise; it is true that a tax cannot be levied on gasoline sold to the United States. The statutory provision for penalty is upheld but may not be enforced here because of the peculiar facts in this case.

Judgment Reversed.

MANDAMUS—STARE DECISIS—No. 12149—*Roberts, et al vs. Gross, et al.—Decided March 11, 1929.*

Facts.—Gross brought mandamus to compel the building inspector of the City of Pueblo to issue a permit for the erection of a building. On the authority of *Chamberlain vs. Roberts, 81 Colo. 83,* the trial court granted the writ.

Held.—The *Chamberlain* case is decisive of this one.

Judgment Affirmed.

PROMISSORY NOTE—ACCELERATION.—No. 12095—*Spears vs. Cook—Decided March 4, 1929.*

Facts.—Spears held Cook's promissory note dated November 12, 1925, payable three years thereafter, without providing for the acceleration of maturity in case of default. This note was secured by a deed of trust providing that the total of principal, interest, etc., should become due at the option of the holder upon any default in payment of principal or interest. There was a default in payment of the interest and Spears brought this action to obtain judgment for the entire amount of the note, but without asking for foreclosure of the mortgage.

Held.—When judgment on the note only is prayed, the acceleration clause in the mortgage does not apply. The lower court was right in entering judgment for accrued interest only.

Judgment Affirmed.

SCHOOL DISTRICTS—DIVISION—No. 12058—*Fanseleau vs. Harker—Decided March 18, 1929.*

Facts.—The president and board of directors of School District No. 4 brought suit against the president and board of directors of School District No. 10 to restrain the defend-

ants from interfering with the official functions of the first-named Board. School District No. 10 was attempted to be carved out of School District No. 4. There were three townships No. 12 in School District No. 4 at the time of the attempted change. The notice of election merely referred to Township 12, but did not designate what particular township 12 of the District would be effected. In the Petition for creation of the new district, the territory to be segregated was not described.

Held.—The election was void. The voters were entitled to know what territory was to be segregated from the old district and placed in the new district. The information given them in the notice of election failed to furnish the necessary information.

Judgment Affirmed.

VIOLATION OF ORDINANCE—INDUCEMENT BY PUBLIC OFFICER —No. 12293—*City of Canon City vs. Landen—Decided March 4, 1929.*

Facts.—Defendant is charged with violating an ordinance of Canon City. The evidence discloses that a municipal detective furnished money with which the defendant willingly bought liquor in violation of the ordinance. The trial court instructed the jury that the verdict should be for the defendant if it appeared that the officer had induced this violation of the law. The verdict was for the defendant.

Held.—There are no facts in this case making the above instruction applicable, because the defendant knowingly and willingly violated the law.

Judgment Reversed and Case Remanded.

WORKMEN'S COMPENSATION—REOPENING OF CASE—No. 12236—*Colorado Fuel and Iron Company vs. Industrial Commission and Medina—Decided February 4, 1929.*

Facts.—Medina, an employee of the Fuel & Iron Company, was injured December 10, 1924, and thereafter brought proceedings for Workmen's Compensation. On May 16,

1927, the referee entered an award setting forth that Medina had suffered no permanent disability. December 14, 1927, a letter was written to the Commission in behalf of the claimant, asking that the case be reopened. The Commission complied with this request without setting forth any reasons for doing so. On January 30, 1928, the Commission found that Medina had sustained 25% permanent total disability. The Company appealed to the District Court, where it was defeated.

Held.—The Commission had the power to re-open the case on its own motion, even though the award of May 16, 1927, was a final determination. The record in the case discloses that there was error, mistake or change in conditions.

Judgment Affirmed.